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No. 86-886

In the Supreme Court of the United States

OCTOBER TERM, 1986

LINDA AUGUSTUS, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioners contend that the court of appeals erred in upholding the district court's denial of their motion to intervene, on grounds that the motion was untimely and that they were raising issues already considered by the court and adequately presented by other parties.[1]

1. a. In August 1973, the United States sued the City of Chicago, alleging that its police department's hiring and promotion practices discriminated against blacks, Hispanics, and women. In 1976, the district court found that the City had indeed so discriminated. *United States* v. *City of Chicago,* 411 F. Supp. 218, 225 (N.D. Ill. 1976), modified, 549 F.2d 415 (7th Cir.), cert. denied, 434 U.S. 875 (1977); see Pet. App. 1. As part of the relief, the court required the City to adopt a 40% quota for promotion of

[1] Petitioners also state that this petition raises issues regarding a "numerical remedy for racial discrimination" (Pet. 1; see also *id.* at 7, 9-10). Because both the district court and court of appeals denied intervention on Fed. R. Civ. P. 24(a) grounds, neither court addressed any remedial issue. The petition does not elaborate on such an issue either, except to note that by being classified as "females" rather than as "blacks," two petitioners were passed over notwithstanding that they received higher scores than any of nineteen black males who were promoted (*id.* at 6). Accordingly, we will not discuss the issue here.

black and Spanish-surnamed persons. The court declined to establish a quota for women at that time, stating that it would do so "when a sufficient number of females are available in the patrol officer rank" (411 F. Supp. at 250-251; Pet. App. 4).

In 1979, the City devised a new promotion list based on a new examination. Because the force's composition had improved, the United States and the City moved in June 1980 to reduce the minority quota to 25% and to establish a 10% quota for women. 663 F.2d at 1357-1358; Pet. App. 4-5. The district court denied the motion, but the court of appeals reversed and remanded in part. *United States* v. *City of Chicago,* 663 F.2d 1354 (7th Cir. 1981) (*en banc*). The court approved the reduction of the minority promotion goal from 40% to 25% (*id.* at 1362), and directed the district court to "consider the desirability of an appropriate promotional quota for females, either to be counted separately from the minority quota or, if appropriate, to be 'double-counted' " (*ibid.*). See also Pet. App. 5.

In June 1982, upon motion of the City and the United States, the district court established a "temporary" 5% quota for women, which would include black women, who would be stricken from the list of black candidates for promotion. The court stated that it would hold further proceedings to address allegations that the 1979 list was discriminatory, and that those who wished to be heard concerning, inter alia, a quota for women—including a separate quota for minority women—should appear at that time. The hearing was held in September 1983. In April 1984, the district court ordered that the established 25% black (excluding females) and 5% female (including blacks) promotion quotas be kept in force. See Pet. App. 5; 6/3/82 Hearing 7-8, 11-14, 16, 19, 21-22, 25-26.

b. Petitioners filed a motion to intervene in November 1984, and an amended motion in February 1985, alleging

that the separate 5% quota for women does not adequately remedy the discriminatory effect of the 1979 examination on black women (Pet. App. 5). At a hearing in June 1985, the district court denied the motion to intervene, holding that it was not timely filed and that it sought to relitigate resolved issues (*id.* at 16-17; see also *id.* at 5-6, 7, 11).

c. The court of appeals affirmed (Pet. App. 1-12). It noted that the determination of timeliness is within the district court's discretion and should be reversed only for an abuse of that discretion (*id.* at 7). The court of appeals pointed out that once the district court ruled in 1980 that there would not be a separate quota for women, petitioners were on notice that the interests they now seek to litigate were at issue. The court of appeals further pointed out that it had specifically remanded in 1981 for consideration of the issue of a separate quota for women, again identifying directly the issue which petitioners now seek to litigate. *Id.* at 10. The court concluded that the time immediately following the 1981 remand was the "most appropriate" time to intervene, "yet the Augustus petitioners waited over three years before seeking [intervention]" (*ibid.*). Relying primarily on the fact that "Judge Marshall has been immersed in the issues of this case for more than a decade," the court further stated that it would not reject the district court's finding that the "petitioners were raising claims that had been raised before and were adequately represented by other parties" (*id.* at 11-12).[2]

2. Petitioners claim that the court of appeals erred in holding that the district court did not abuse its discretion when it denied their motion to intervene. The court of ap-

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[2] The court of appeals also affirmed the district court's denial of another motion to intervene (filed by the "Baker petitioners"). Pet. App. 2, 7-10, 11-12. That affirmance is not at issue in the current petition.

peals was correct, however, and in any event its opinion is entirely factbound, applying only well-established and uncontroversial legal principles. This case presents no conflict with any decision of this Court or any other court of appeals, and further review is not warranted.

Fed. R. Civ. P. 24(a) requires that intervention be permitted "[u]pon timely application" and "unless the applicant's interest is adequately represented by existing parties." The district court specifically found that petitioners' interests had been adequately represented (Pet. App. 11-12, 16-17). Certainly the issue of a separate quota for females and the treatment of minority females was considered repeatedly and explicitly beginning in 1980. The court of appeals, however, relied principally on the fact that petitioners had failed to intervene in a timely manner, although they had long known that their interests were at stake (*id.* at 10). That decision by the court of appeals presents no issue calling for this Court's consideration.

At least four separate times prior to their attempted intervention in 1984, events made clear that intervention concerning the treatment of black women would be appropriate. "[O]nce the district court ruled in July 1980 that the City could keep in force the 1976 promotional quota for minorities but could not have a separate quota for females—the one proposed would have double-counted minority women—the Augustus petitioners knew that no specific allotment had been made for black women" (Pet. App. 10). In 1981, the court of appeals directed the district court to "consider the desirability of an appropriate promotional quota for females, either to be counted separately from the minority quota, or, if appropriate, to be 'double-counted' " (663 F.2d at 1362). Thereafter, in 1982, the district court ordered a temporary 5% quota and made clear that it would be considering a separate quota for black women at the full hearing it then held in 1983. Petitioners did not move to intervene as a result of any of these

events, but only did so seven months after the district court issued its decision retaining the 5% promotion quota for women in April 1984.

Litigants are obliged to intervene when they learn their interests are at stake. See *NAACP* v. *New York*, 413 U.S. 345, 364-369 (1973); 3B J. Moore & J. Kennedy, *Moore's Federal Practice* ¶ 24.13, at 24-144 to 24-159 (1985 & Supp. 1986).[3] Clearly it was not an abuse of discretion to hold that petitioners, who waited until the litigation was over, have waited too long to assert their rights.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

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[3] Thus, petitioners' assertion (Pet. 9) that their interests were not represented below only underscores that they were obliged to step in at that time and assert those rights. See *NAACP* v. *New York*, 413 U.S. at 366-368. In this regard, we note that petitioners did not seek to intervene to appeal, but to reopen the litigation in district court. See Motion to Intervene as Plaintiffs, at 4-5; Amended Motion to Intervene, at 1, 3.

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